Supreme Court, U.S.
FILED
FEB 5 - 2004
OFFICE OF THE CLERK

No. 03-956

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,
Petitioners,

v.

NANCY WYMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CENTER FOR PUBLIC JUSTICE, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

KEVIN J. HASSON
Counsel of Record
ROMAN P. STORZER
ANTHONY R. PICARELLO, JR.
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., NW, Suite 605
Washington, DC 20036

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

STATEMENT OF THE CASE 2

I. THE LOWER COURT'S DECISION THREATENS THE FREE ASSOCIATION RIGHTS OF RELIGIOUS EXPRESSIVE ORGANIZATIONS 3

II. MEMBERSHIP POLICIES ARE INDISPENSABLE TO MESSAGE CONTROL IN EXPRESSIVE ASSOCIATIONS 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Barnes-Wallace v. Boy Scouts of America,
275 F. Supp. 2d 1259 (S.D. Cal. 2003) 4
Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 2, 12
Boy Scouts of America v. Wyman,
213 F. Supp. 2d 159 (D. Conn. 2002) 3
Boy Scouts of America, South Florida Council v. Till,
136 F. Supp. 2d 1295 (S.D. Fla. 2001) 3, 4
Curran v. Mount Diablo Council of the Boy Scouts of America, 72 Cal. Rptr. 2d 410 (1992) 4
Dale v. Boy Scouts of America, 734 A.2d 1196
(N.J. 1999), *rev'd*, 530 U.S. 640 (2000) 10
Diamond v. Congregation Kol Ami, 1996 WL 942039,
at *6 (Chi. Com. Hum. Rel.) 11
E.E.O.C. v. Pacific Press Publishing, 676 F.2d 1272
(9th Cir. 1982) 10
Evans v. City of Berkeley, 127 Cal. Rptr. 2d 696
(1st Cal. App. Dist. 2002) 4
NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 13
New York State Club Ass'n, Inc. v. City of New York,
487 U.S. 1 (1988) 13
Pines v. Tomson, 206 Cal. Rptr. 866
(Cal. App. 2d Dist. 1984) 10
Roberts v. United States Jaycees,
468 U.S. 609 (1984) 11, 12
Vigars v. Valley Christian Center,
805 F. Supp. 802 (N.D. Cal. 1992) 10
White v. Lee, 227 F.3d 1214 (2000) 13

Statutes

43 PA. CONS. STAT. § 954(l) (1999) 6
775 ILL. COMP. STAT. ANN. 5/5-103 (1999) 6
ALASKA STAT. § 18.80.200 *et seq.* (Michie 1999) 4
ALASKA STAT. § 18.80.230 (Michie 1999) 6

ARIZ. REV. STAT. § 41-1442 *et seq.* (2004) 4
ARIZ. REV. STAT. § 41-1492.07 (1999) 5
CAL. CIVIL CODE § 51 (Deering 1999) 4, 6
COLO. REV. STAT. § 24-34-601 (1999) 4, 6
CONN. GEN. STAT. § 46a-63 *et seq.* (1999) 4
CONN. GEN. STAT. § 46a-64(b)(4) (1999) 5
CONN. GEN. STAT. § 5-262 2
CONN. GEN. STAT. §§ 46a-81a—46a-81r 2
CONN. GEN. STAT. §§ 46a-81p, 46a-81q 5
D.C. CODE ANN. § 2-1402.31 (2004) 6
D.C. CODE ANN. § 2-1402.31 *et seq.* (2004) 4
DEL. CODE ANN. tit. 6, § 4500 *et seq.* (1999) 4
DEL. CODE ANN. tit. 6, § 4502(1) (1999) 6
FLA. STAT. Ch. 760 *et seq.* (1999) 4
FLA. STAT. Ch. 760.07 (1999) 6
HAW. REV. STAT. ANN. § 489-1 *et seq.* (Michie 1999) 4
HAW. REV. STAT. ANN. § 489-2 (Michie 1999) 6
IDAHO CODE § 67-5901 *et seq.* (1999) 4
IDAHO CODE § 67-5910(1) (1999) 5
ILL. COMP. STAT. ANN. Ch. 775 5/5-101 *et seq.* (1999) 4
IND. CODE ANN. § 22-9-1-1 *et seq.* (Michie 1999) 4
IND. CODE ANN. § 22-9-1-3(q)(3) (Michie 1999) 5
IOWA CODE § 216 *et seq.* (1997) 4
IOWA CODE § 216.12(1) (1997) 5
IOWA CODE § 216.7(2) (1997) 5
KAN. STAT. ANN. § 44-1001 *et seq.* (1998) 4
KAN. STAT. ANN. § 44-1002(h) (1998) 5
KY. REV. STAT. ANN. § 344.110 *et seq.* (Michie 1998) 4
KY. REV. STAT. ANN. § 344.130 (Michie 1998) 6
LA. REV. STAT. ANN. § 49:146 (West 1999) 4
LA. REV. STAT. ANN. § 49:146(A)(5) (West 1999) 5
MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999) . 4, 6
MD. CODE ANN., Discrimination in Public Accommodation § 5 (1999) 4
ME. REV. STAT. ANN. tit. 5, § 4552 *et seq.* (West 1998) 4
MICH. S.A. § 37.2301 (2004) 4
MINN. STAT. § 363A.11 *et seq.* (2004) 4

MINN. STAT. § 363A.26 (2004) 6
MO. R. STAT. § 213.065 *et seq.* (2004) 4
MONT. CODE ANN. § 49-2-101 *et seq.* (1999) 4
MONT. CODE ANN. § 49-2-101(20) (1999) 6
N.D. CENTURY CODE § 14-02.4-14 (2004) 4, 6
N.H. REV. STAT. ANN. § 354-A:1 *et seq.* (1999) 4
N.H. REV. STAT. ANN. § 354-A:18 (1999) 6
N.J. STAT. ANN. § 10:5-4 *et seq.* (West 2004) 4
N.J. STAT. ANN. § 10:5-5(l) (West 1999) 5
N.M. STAT. ANN. § 28-1-1 *et seq.* (Michie 2000) 4
N.M. STAT. ANN. § 28-1-9(B) (Michie 2000) 6
N.Y. EXECUTIVE LAW § 291 *et seq.* (1999) 4
N.Y. EXECUTIVE LAW § 292(9) (1999) 5
NEB. R. STAT. § 20-132 (1999) 4
NEB. REV. STAT. ANN. § 20-137 (Michie 1999) 6
NEV. REV. STAT. ANN. § 651.050 *et seq.* (Michie 2000) 4
NEV. REV. STAT. ANN. § 651.050(2) (Michie 2000) 6
OHIO REV. CODE ANN. § 4112.01 *et seq.* (Anderson 1999) ... 5
OHIO REV. CODE ANN. § 4112.02(G) (Anderson 1999) 6
OKLA. STAT. tit. 25, § 1401 (1999) 6
OKLA. STAT. tit. 25, § 1401 *et seq.* (1999) 5
OR. REV. STAT. § 659A.403 (2004) 6
OR. REV. STAT. § 659A.403 *et seq.* (32004) 5
PA. CONS. STAT. tit. 43 § 952 *et seq.* (1999) 5
R.I. GEN. LAWS § 11-24-1 *et seq.* (1999) 5
R.I. GEN. LAWS § 11-24-3 (1999) 6
S.C. CODE ANN. § 45-9-10 (1998) 6
S.C. CODE ANN. § 45-9-10 *et seq.* (1998) 5
S.D. CODIFIED LAWS § 20-13-1 *et seq.* (Michie 2000) 5
S.D. CODIFIED LAWS § 20-13-1(12) (Michie 2000) 6
TENN. CODE ANN. § 4-21-102 *et seq.* (1999) 5
TENN. CODE ANN. § 4-21-102(15) (1999) 6
UTAH CODE ANN. § 13-7-1 *et seq.* (1999) 5
UTAH CODE ANN. § 13-7-2 (1999) 5
VA. CODE ANN. § 2.2-3900B *et seq.* (2004) 5
VT. STAT. ANN. tit. 9, § 4501 *et seq.* (2000) 5
VT. STAT. ANN. tit. 9, § 4501(8) (2000) 7

W. VA. CODE § 5-11-1 *et seq.* (2000) 5
W. VA. CODE § 5-11-3(j) (2000) 7
WASH. REV. CODE § 49.60.040(10) (1999) 5
WASH. REV. CODE in § 49.60.010 *et seq.* (1999) 5
WYO. STAT. ANN. § 6-9-101 (Michie 1999) 5, 7

INTEREST OF THE *AMICI*

Under Rule 37.5 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief on behalf of itself and others as *amici curiae* in support of Petitioner.[1] The Becket Fund is a bipartisan and interfaith public interest law firm that protects the free expression of all religious traditions. The Becket Fund is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of religious and other expressive organizations to pursue their missions without excessive government regulation and entanglement.

The Center for Public Justice is a national, public policy and civic education organization that advocates the equal treatment of all faiths in the public square. For over 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public as well as in private life.

The Ethics & Religious Liberty Commission is the Southern Baptist Convention agency charged with addressing the moral, ethical and religious liberty issues of our day. The Southern Baptist Convention is the largest non-Catholic denomination in the United States, with over sixteen million members in more than 42,000 local churches.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") is the largest non-profit Orthodox Jewish umbrella organization in this nation, representing nearly 1,000 Jewish congregations throughout the United States. Through its Institute for Public Affairs, the U.O.J.C.A.

---

[1] All parties have consented to the filing of this brief. A consent letter signed by the Petitioners and Respondents has been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and its members made any monetary contribution to the preparation and submission of this brief.

researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with this court in many important cases affecting the Jewish community and American society at large.

STATEMENT OF THE CASE

The Boy Scouts of America and its local councils are private organizations that include religious belief and moral rectitude among their membership requirements. Their basic purpose is to convey and inculcate in young men a specific vision of morals and character. The Boy Scouts' vision requires limiting membership to persons willing to recognize God and refrain from avowing homosexuality. However, since this Court's holding in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Boy Scouts' particular viewpoint on religion and morals, expressed through its membership policies, has come under repeated assault by states and municipalities attempting to legislatively "overrule" this Court's decision. The State of Connecticut ("Connecticut") has joined this faction by specifically targeting the Boy Scouts and expelling them from its annual state employee charitable fundraising campaign ("Campaign")[2] in the name of Connecticut's "Gay Rights Law." *See* CONN. GEN. STAT. §§ 46a-81a—46a-81r.

Connecticut's Campaign is made generally available to organizations that fulfill "charitable and public health, welfare, environmental, conservation or service purposes." CONN. GEN. STAT. § 5-262. As such, the court below easily found that the Campaign constitutes a nonpublic forum and, absent a compelling justification, Connecticut may not discriminate against the Boy Scouts' viewpoint when conveyed through the forum. *Boy Scouts of America v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003). However, the court dodged the obvious

[2] The Campaign is governed by CONN. GEN. STAT. § 5-262.

implication of the Gay Rights Law on the Boy Scouts' ability to be free from viewpoint discrimination by describing this plainly targeted action as merely "differential adverse impact on . . . viewpoint . . . ." *Id.* at 93. Creating this new legal standard to justify such obvious viewpoint-based hostility has dire consequences on the ability of all expressive associations—and especially religious ones—to participate fully in the public square.[3]

I. THE LOWER COURT'S DECISION THREATENS THE FREE ASSOCIATION RIGHTS OF RELIGIOUS EXPRESSIVE ORGANIZATIONS.

Allowing the lower court's decision to stand would place a vast array of currently protected membership-based expressive associations at the mercy of the state. This danger is particularly menacing to religious organizations that regularly take (often unpopular) positions on the very same moral issues addressed by States' own discrimination laws. The Boy Scouts' unwavering stance on membership criteria, at least those related to sexual conduct and religious belief, has resulted in numerous lawsuits by activists and municipalities seeking to deny the Boy Scouts *any* access to state benefits and public fora.[4] The escalating attacks confronting the Boy Scouts are

---

[3] The District Court below refused to apply the strikingly apposite (but opposite) holding of *Boy Scouts of America, South Florida Council v. Till*, 136 F. Supp. 2d 1295, 1310-11 (S.D. Fla. 2001) (Striking down a Florida school board's decision to "exclud[e] the Boy Scouts from Broward school facilities based on their anti-gay viewpoint"). The court never questioned the propriety of the *Till* decision but rather attempted to distinguish it by arguing that, unlike Connecticut, the school board in *Till* did not have a "state anti-discrimination statue back[ing] it up," only a county one. *Boy Scouts of America v. Wyman*, 213 F. Supp. 2d 159, 167 (D. Conn. 2002). Inexplicably, the Second Circuit simply ignores *Till* and only mentions the decision in a footnote concerning a purely ancillary issue. *Wyman*, 335 F.3d at 88 n.2.

[4] *See, e.g., Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696

merely a foretaste of what awaits religious organizations unless this decision is corrected. If not, many expressive associations that choose to reflect any controversial views on abortion, female clergy, homosexual marriage, contraceptive medical coverage, and religious affiliation through their membership and hiring policies will risk having to change their messages or face an avalanche of lawsuits.

The Second Circuit's reasoning could easily be applied to a host of laws affecting expressive association. At least 43 states have general laws banning discrimination, primarily in public accommodations.[5] While some laws generally exempt

---

(1st Cal. App. Dist. 2002), *Boy Scouts of America, South Florida Council v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001), *Curran v. Mount Diablo Council of the Boy Scouts of America*, 72 Cal. Rptr. 2d 410 (1992).

[5] ALASKA STAT. § 18.80.200 *et seq.* (Michie 1999); ARIZ. REV. STAT. § 41-1442 *et seq.* (2004); CAL. CIVIL CODE § 51 (Deering 1999); COLO. REV. STAT. § 24-34-601 (1999); CONN. GEN. STAT. § 46a-63 *et seq.* (1999); DEL. CODE ANN. tit. 6, § 4500 *et seq.* (1999); D.C. CODE ANN. § 2-1402.31 *et seq.* (2004); FLA. STAT. Ch. 760 *et seq.* (1999); HAW. REV. STAT. ANN. § 489-1 *et seq.* (Michie 1999); IDAHO CODE § 67-5901 *et seq.* (1999); ILL. COMP. STAT. ANN. Ch. 775 5/5-101 *et seq.* (1999); IND. CODE ANN. § 22-9-1-1 *et seq.* (Michie 1999); IOWA CODE § 216 *et seq.* (1997); KAN. STAT. ANN. § 44-1001 *et seq.* (1998); KY. REV. STAT. ANN. § 344.110 *et seq.* (Michie 1998); LA. REV. STAT. ANN. § 49:146 (West 1999); ME. REV. STAT. ANN. tit. 5, § 4552 *et seq.* (West 1998); MD. CODE ANN., Discrimination in Public Accommodation § 5 (1999); MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999); MICH. S.A. § 37.2301 (2004); MINN. STAT. § 363A.11 *et seq.* (2004); MO. R. STAT. § 213.065 *et seq.* (2004); MONT. CODE ANN. § 49-2-101 *et seq.* (1999); NEB. R. STAT. § 20-132 (1999); NEV. REV. STAT. ANN. § 651.050 *et seq.* (Michie 2000); N.H. REV. STAT. ANN. § 354-A:1 *et seq.* (1999); N.J. STAT. ANN. § 10:5-4 *et seq.* (West 2004); N.M. STAT. ANN. § 28-1-1 *et seq.* (Michie 2000); N.Y. EXECUTIVE LAW § 291 *et seq.* (1999); N.D. CENTURY CODE § 14-02.4-14 (2004); OHIO REV. CODE ANN. § 4112.01 *et seq.* (Anderson 1999); OKLA. STAT. tit. 25, § 1401 *et seq.* (1999); OR. REV. STAT. § 659A.403 *et seq.* (2004); PA. CONS. STAT. tit. 43 § 952 *et seq.* (1999); R.I. GEN. LAWS § 11-24-1 *et seq.* (1999); S.C. CODE ANN. § 45-9-10 *et seq.* (1998); S.D. CODIFIED LAWS § 20-13-1 *et seq.* (Michie 2000); TENN. CODE ANN. § 4-21-102 *et seq.* (1999); UTAH CODE ANN. § 13-7-1 *et seq.* (1999); VT.

religious organizations from their anti-discrimination statutes,[6] including Connecticut's Gay Rights Law,[7] more limit that exemption only to certain kinds of accommodations,[8] or only to certain categories of discrimination.[9] Other states have no

---

STAT. ANN. tit. 9, § 4501 *et seq.* (2000); VA. CODE ANN. § 2.2-3900B *et seq.* (2004); WASH. REV. CODE in § 49.60.010 *et seq.* (1999); W. VA. CODE § 5-11-1 *et seq.* (2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

[6] *See* ARIZ. REV. STAT. § 41-1492.07 (1999); IDAHO CODE § 67-5910(1) (1999); KAN. STAT. ANN. § 44-1002(h) (1998); N.Y. EXECUTIVE LAW § 292(9) (1999).

[7] CONN. GEN. STAT. §§ 46a-81p, 46a-81q.

[8] *See* CONN. GEN. STAT. § 46a-64(b)(4) (1999) (exempting nursing homes "owned, operated by or affiliated with a religious organization"); IOWA CODE § 216.12(1) (1997) (exempting housing); ME. REV. STAT. ANN § 4573-A (exempting any "religious corporation, association, educational institution or society from giving preference in employment to individuals of its same religion . . . ."). N.J. STAT. ANN. § 10:5-5(l) (West 1999) (exempting "any educational facility operated or maintained by a bona fide religious or sectarian institution"); UTAH CODE ANN. § 13-7-2 (1999) (exempting "any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public."); WASH. REV. CODE § 49.60.040(10) (1999) (exempting "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution . . . .").

[9] *See* IND. CODE ANN. § 22-9-1-3(q)(3) (Michie 1999) ("it shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only."); IOWA CODE § 216.7(2) (1997) ("This section shall not apply to (A) Any bona fide religious institution with respect to any qualifications the institution may impose based on religion . . . ."); LA. REV. STAT. ANN. § 49:146(A)(5) (West 1999) ("The provisions of this Section shall not prohibit any religious or private institution of elementary, secondary, or higher education from denying access to any area, accommodation, or facility on the basis of religion or sex."); MINN. STAT. § 363A.26 (2004) ("Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious

religious exemptions at all.[10] Moreover, whatever protection government grants can just as easily be taken away, but for the

---

association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities."); NEB. REV. STAT. ANN. § 20-137 (Michie 1999) ("Any place of public accommodation owned by or operated on behalf of a religious corporation, association, or society which gives preference in the use of such place to members of the same faith as that of the administering body shall not be guilty of discriminatory practice."); N.H. REV. STAT. ANN. § 354-A:18 (1999) ("Nothing in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or education purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained."); N.M. STAT. ANN. § 28-1-9(B) (Michie 2000) ("any religious or denominational institution . . . limiting admission to or giving preference to persons of the same religion or denomination . . . .").

[10] *See* ALASKA STAT. § 18.80.230 (Michie 1999); CAL. CIVIL CODE § 51 (Deering 1999); COLO. REV. STAT. § 24-34-601 (1999); DEL. CODE ANN. tit. 6, § 4502(1) (1999); D.C. CODE ANN. § 2-1402.31 (2004); FLA. STAT. Ch. 760.07 (1999); HAW. REV. STAT. ANN. § 489-2 (Michie 1999); 775 ILL. COMP. STAT. ANN. 5/5-103 (1999); KY. REV. STAT. ANN. § 344.130 (Michie 1998); MD. CODE ANN., Discrimination in Public Accommodations § 5 (1999); MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999); MONT. CODE ANN. § 49-2-101(20) (1999); NEV. REV. STAT. ANN. § 651.050(2) (Michie 2000); N.D. CENTURY CODE § 14-02.4.-14 (2004); OHIO REV. CODE ANN. § 4112.02(G) (Anderson 1999); OKLA. STAT. tit. 25, § 1401 (1999); OR. REV. STAT. § 659A.403 (2004); 43 PA. CONS. STAT. § 954(l) (1999); R.I. GEN. LAWS § 11-24-3 (1999); S.C. CODE ANN. § 45-9-10 (1998); S.D. CODIFIED LAWS § 20-13-1(12) (Michie 2000); TENN. CODE ANN. § 4-21-102(15) (1999); VT. STAT. ANN. tit. 9 § 4501(8) (2000); W. VA. CODE § 5-11-3(j) (2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

First Amendment.[11]

II. MEMBERSHIP POLICIES ARE INDISPENSABLE TO MESSAGE CONTROL IN EXPRESSIVE ASSOCIATIONS

The right to associate freely for the purpose of religious expression is essential:

> An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as

---

[11] A particularly chilling result of applying anti-discrimination laws to institutions that espouse religious beliefs is that courts have put themselves into the position of independently evaluating whether the organization's beliefs are truly being violated by such application. *See Dale v. Boy Scouts of America*, 734 A.2d 1196, 1228 (N.J. 1999) ("Nothing before us, however, suggests that one of Boy Scouts' purposes is to promote the view that homosexuality is immoral."); *Pines v. Tomson*, 206 Cal. Rptr. 866, 877 (Cal. App. 2d Dist. 1984) ("Paragraph 1 simply enjoins appellants from refusing advertisements on the ground the person attempting to place an advertisement is not, or will not affirm that he is, a 'born-again' Christian. Thus, the religious purposes appellants have asserted for publishing the CYP are not impaired . . . ."); *E.E.O.C. v. Pacific Press Publishing*, 676 F.2d 1272, 1279 (9th Cir. 1982) ("Preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women . . . ."); *Vigars v. Valley Christian Center*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (questioning whether being a pregnant single woman made an unfit role model at a religious school); *Diamond v. Congregation Kol Ami*, 1996 WL 942039 *6 (Chi. Com. Hum. Rel.) ("Kol Ami invites the Administrative Hearing Officer and this Commission to dismiss this case . . . when it made no effort to respect its own religious doctrine by ignoring the minimal qualifications for persons chosen to serve in positions of religious leadership.").

> implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis added). Membership selection must be the touchstone for associational expression if "association" is to have any meaning at all. Membership criteria in expressive associations are expressive *in and of themselves* because, at a minimum, they define who can and cannot speak as part of the organization. *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). More than any bylaws or charters, the members of a group represent its fundamental nature; they *are* the association. When a voluntary association is predominantly engaged in expression, any outside interference with its membership necessarily alters the group's message. *Roberts*, 468 U.S. at 635-36 (O'Connor, J., concurring).

Associational rights are not second-class protections under free speech doctrine. They are, and must remain, robust. These rights are violated when the forced inclusion of an unwanted member would significantly alter the group's message. *See Dale*, 530 U.S. at 652. Such intrusion into group membership erodes the original group members' ability to advocate and retain the views that brought them together, nullifying their free association rights. *See Roberts*, 468 U.S. at 623. The First Amendment prevents government not only from punishing an association's message but also from imposing the equivalent of prior restraints through coerced membership.

Expressive association rights are not diminished, but are in fact *more* important, when a group's viewpoint is unpopular

with the government, as the Boy Scouts' is with the State of Connecticut. Free association and free speech rights are most crucial in the service of controversial causes because they provide what may be the only opportunity for those with minority views to effectively participate in both public and private discourse. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). It is essential for the maintenance of a free and open democracy that expressive association not be limited to causes deemed "proper" by the government, but be extended to all viewpoints. *See White v. Lee*, 227 F.3d 1214, 1227 (2000) ("The right to expressive association includes the right to pursue, as a group, discriminatory policies that are antithetical to the concept of equality for all persons.").

The Boy Scouts' membership policies and their commitment to community service both flow from the same source: a dedication to inculcating religious and moral values in young children through teaching and example. The Boy Scouts' membership policies are not only protected forms of speech but also are crucially related to its community service mission. Discriminating against them through the Gay Rights Law and subsequent restricted access to a forum for expression is not the equivalent of, as the Second Circuit puts it, "an ordinance against outdoor fires." *Wyman*, 335 F.3d at 94 (quoting *R.A.V. v. City of St. Paul,* 505 U.S. 377, 385 (1992)). The intent behind such a fire ordinance is to protect public safety, not to endorse a particular view on "dishonoring the flag" (and concomitantly to reject or disadvantage the opposite view). *Id.* The purpose behind the Gay Rights Law is explicitly to prevent "[s]exual orientation" from being "considered as a limiting factor," and therefore the State is clearly adopting a specific viewpoint on this moral issue. C.G.S.A. § 46a-81n(a). Through the application of its charitable campaign, it is rejecting an alternative viewpoint. The Second Circuit's analogy—and its revolutionary standard

for viewpoint discrimination—is flawed. The Court should not tolerate this dodge of *Dale*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN J. HASSON
Counsel of Record
ROMAN P. STORZER
ANTHONY R. PICARELLO, JR.
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW,
Suite 605
Washington, DC 20036
Counsel for Amici Curiae

February 5, 2004.